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**DECISION**



*D. H. ...*  
*7.5.2*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**FILE:** B-188129

**DATE:** October 11, 1977

**MATTER OF:** Marotta Scientific Controls, Inc.

**DIGEST:**

1. Where, as here, conflicting statements of protester and contracting agency--concerning whether protester was given reasonable opportunity (time) to submit best and final offer--constitute only available evidence, we do not believe protester has met burden of affirmatively proving its case.
2. Where agency listed evaluation factors in descending order of importance and following receipt of proposals evaluation panel varies emphasis of certain factors but principal factors remain in same order of importance, protest against such variation is denied as alleged change in emphasis was not radical departure from RFP's evaluation scheme clearly made known to offerors.
3. Protester who contends that prejudice against it by agency personnel in evaluating its technical proposal was one cause of its omission from competitive range must establish that evaluation was not reasonable.

Request for proposals No. N00123-76-R-1888 was issued by the Naval Regional Procurement Office (NRPO), Long Beach, on August 18, 1976, for the design and production of portable automated pressure calibration systems and related materials and services. The required systems were to utilize advanced electronic transducer and control technologies so as to achieve three overall purposes: high accuracy, small size, and ease of use.

Technical and price proposals were submitted by six companies. The technical proposals were sent by the contracting activity to the using agency, the Metrology Engineering Center (MEC), for evaluation. Results of this technical review were that the Instrumentation Technology Corporation (ITC) received 82 of a possible 100 points; Marotta Scientific Controls, Inc. (Marotta), and King Natronics (King) received 70 points each; and two other offerors received 56 and 46 points, respectively. The sixth offeror received no score as its proposal deviated entirely from the required technical requirements. The contracting officer determined the competitive range to include the proposals of ITC, Marotta, and King. On November 17, 1976, the contracting officer telephonically contacted these three firms and advised them that, at minimum, best and final offers would be due by November 30 and that a letter regarding this matter would be sent each offeror. Best and final offers were received and were evaluated by MEC with the following score results: ITC, 84; Marotta, 71; King, 71. Marotta protested any award to ITC. A determination was made by the contracting activity that award should be made prior to any resolution of the protest, and the contract was signed on December 30, 1976.

The first basis of the Marotta protest is as follows. It is contended that contrary to paragraph 3-805.3(d) of the Armed Services Procurement Regulation (ASPR) (1976 ed.) Marotta was not given a reasonable opportunity to submit a best and final offer. This is so, it is contended, because during the November 17 telephone conversation Marotta was not advised of the criticality of the deadline for best and final offer submission; was not told of the need to individually price the accessory case, nitrogen supply assembly, and CDRL items; and was not advised of the possible late arrival of the letter (dated November 18) requesting submission of a best and final offer. Marotta apparently did not receive that letter until November 29, or 1 day before the submission deadline. While Marotta had begun to work on such an offer, it is the normal Marotta policy--we are told--to rely only on material put into writing as Marotta has found that oral and written communications often vary in content. Consequently, the level of effort found necessary upon receipt of the activity letter had not been started. Upon receipt of the letter Marotta immediately requested an extension of the submission deadline date to December 6. The contracting officer advised no extension beyond December 2 could be granted.

Marotta contends that any extension to less than December 6 was inadequate causing insufficient offer preparation time and even causing Marotta, in the rush to submit a best and final offer, to forget to include therein certain prepared information. Further, inadequate time caused Marotta to be unable to properly compute its best and final prices. In support of this contention Marotta cites our decision in Chrysler Motors Corporation, B-186600, September 29, 1976, 76-2 CPD 294, where we held that a telephonic transmission of a specification change on the day best and final offers were to have been submitted, which Chrysler personnel did not understand, did not constitute the provision of an equal opportunity for Chrysler to compete and that only a written confirmation of that transmission issued in compliance with the pertinent regulations could constitute such. It is believed by Marotta that the same factual situation applies in this instance.

The contracting activity reports that prior to November 17 the need to consummate the procurement became more urgent than had previously been anticipated and that contract award prior to the end of the calendar year became a requirement. These new constraints were largely budgetary over which the contracting or requiring activity had no control. Further, the agency stated that during the November 17 telephone conversation with Marotta personnel the proposal deficiencies to be addressed in the best and final offer letter, the fact that November 30 would be the submission deadline date, the fact that this date was critical and could not be extended, and the fact that the confirming letter was likely to arrive late were all discussed. Marotta was advised to start preparation of its offer immediately.

We do not believe the first basis of the protest has merit. In Chrysler Motors Corporation, supra, the change only was communicated to Chrysler on the very date set as a deadline date for offer submission, so that at minimum Chrysler was not afforded the time to consider the changes from the time it was orally advised of the change to the time it received written confirmation of the oral advice, which was not sent. Further, the contracting activity suggested that some difficulties in clearly transmitting the oral information may have occurred. In the instant case, the pertinent personnel of the contracting activity state by affidavits that they advised Marotta of all the technical questions that would have to be considered and of the criticality of the deadline date. In an affidavit by Marotta's systems engineer he remembers the facts differently.

Where, as here, conflicting statements of the protester and the contracting agency constitute the only available evidence, we do not believe that the protester has met the burden of affirmatively proving its case. The Public Research Institute of the Center for Naval Analyses of the University of Rochester, B-187639, August 15, 1977, 77-2 CPD 116, and cases cited therein.

Further, while we appreciate the Marotta policy of waiting for written confirmation of oral communications, we do not understand why, when admittedly Marotta knew the deadline date had been set for November 30, Marotta did not communicate with the contracting activity and express concern when it had not received the letter as of November 28, if not even earlier. Further, since Marotta had previously determined a price for the entire equipment it offered, we do not understand what the difficulty would be in making the required individual pricing determinations. In any event, we find that failure to have an adequate time to prepare and submit a best and final offer lies with Marotta and not the Government.

The second basis of the protest is that contrary to ASPR § 3-501(b) (3) (D) (1) the Marotta proposal was improperly evaluated (as were all the proposals) because the evaluation criteria as set forth in the solicitation were not strictly followed, some of the subcriteria were deleted, and some new subcriteria were added. In addition, it is argued that ASPR § 3-805.4(a) was violated because the offerors were not advised of these alterations.

The evaluation method and criteria were set forth in the solicitation in the following manner:

"SECTION D - EVALUATION AND AWARD FACTORS

"D-1 Award will be made to that offeror considered best qualified to provide the material and support functions described herein as based on the following evaluation factors which are listed in descending order of importance:

- "a. Technical Approach to Meet Specifications.
- "b. Life Support Services
- "c. Expanded Capability beyond Detailed Requirements
- "d. Price

"D-1.1 Factor a. is considered of major importance  
Factor b. is more important than factor c. It is not expected that factor d. (price) will be as important as the factors set forth above, and it will not necessarily be controlling. However, it is an important factor.

"D-1.2 Technical Approach to Meet Specifications. The parameters and functions set forth in Attachment No. 1 are of two categories: Required Specifications and Design Goals. Non-compliance with the Required Specifications will result in the determination that such offers are unacceptable and, therefore, do not warrant further consideration or negotiations. Design Goals shall be evaluated as to their compliance with the parameters and functions set forth in the solicitation. In addition to the above, both Required Specifications and Design Goals will be evaluated as to:

- "(1) Soundness of technical approach.
- "(2) Feasibility of approach
- "(3) Reliability and maintainability rationale.

"D-1.3 Life support services shall be evaluated based on the following:

- "(a) Availability of Calibration and Repair services.
  - "(1) Turn-around time.
  - "(2) Capability of service organization.
- "(b) Availability of support services.
  - "(1) Training services.
  - "(2) Repair parts.
  - "(3) Warranty.
- "(c) Past experience in (a) and (b) above.

"D-1.4 Expanded Capability features shall be evaluated based on the following:

- "(a) Extent of expanded capability.
- "(b) Additional price.
- "(c) Soundness and Feasibility of Technical approach.

"D-1.5 Price. Importance of price will increase with the degree of equality of proposals as determined by other factors upon which selection is to be based."

The evaluation criteria used by the MEC were as follows:

CATEGORY	POSSIBLE POINTS
TECHNICAL APPROACH	
1. Compliance w/performance specifications.	15
2. Soundness of approach method.	15
3. Modularity to achieve obsolescence.	10
4. Thoroughness of self check.	10
5. Minimize size & weight.	15
LIFE SUPPORT SERVICES	
1. Turn around time/quality	10
2a. Training Services	5
2b. Spare Parts	5
2c. Warranty	5
EXPANDED CAPABILITY/PERFORMANCE BEYOND TECHNICAL REQUIREMENTS	10
TOTAL	100

The criteria used to evaluate best and final offers were the same except the third one under technical approach was changed to "Modularity to Eliminate Obsolescence (Maintainability, Reliability)."

Specifically, counsel for Marotta argues that: (1) feasibility was omitted from the evaluation factors (2) the evaluation of reliability and maintainability was altered to one stressing modularity in the electronics (3) the thoroughness of self-check was given too much emphasis in view of the other required specifications and (4) paragraph 3.6.2.1 of the specification required that the pressure controller unit not exceed a weight of 35 pounds, yet this mandatory weight limit was changed to a "design goal" of 35 pounds with a maximum weight of 38.5 pounds in IFC's contract, a deviation not allowed to other offerors.

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Marotta notes that in our decision in AEL Services, B-179703, April 26, 1974, 74-1 CPD 217 (see also BDM Services Company, B-180245, May 9, 1974, 74-1 CPD 237) we held that:

"\* \* \* the integrity of the competitive procurement system demands the timely disclosure of evaluation data to prospective offerors so that both the procuring activity and the responding offerors may be on a common ground as to the basis of award selection \* \* \* [W]ithholding of relevant evaluation criteria raises the question of impartiality of the evaluation process."

Further, Marotta argues that in our decision in Dynalelectron Corp., B-187057, February 8, 1977, 77-1 CPD 95, we ruled that where certain evaluation subcriteria as set forth in the solicitation had been ignored by the evaluators and certain others emphasized, a reevaluation of all best and final offers should be made. It is submitted that such is the case here, since offerors were not properly advised that the requirement for compliance with the "required" portions of the specification and with "feasibility" would be deleted. Further, particular specification requirements were converted into evaluation criteria, such as weight and size, which had been previously "required" and nonnegotiable.

As regards the additional weight allowance given ITC, the contracting activity maintains that this allowance worked in no way to the prejudice of Marotta. The difficulty with Marotta's position, it is contended, is that the major failure of Marotta's proposal was its inferior approach to the problems to be solved with the design effort required. Marotta, in its proposal, never even discussed weight except to state that the 35-pound requirement would be met. Its lack of concern over weight, the contracting activity maintains, is proven by the fact that Marotta proposed several alternative transducers with total weight variations of 6.5 pounds. Further, in various significant areas Marotta offered much less desirable approaches and equipment than ITC, and the superiority given by ITC had nothing to do with weight. Award of the contract was made to the offeror proposing the best and most effective system design. Marotta's proposal was simply the inferior of the two.

As specifically regards the requirement that the 35-pound limit be met, it is contended by NRPO that a strict adherence thereto would have required rejection of all proposals received. While it is conceded that all offerors should have been told the 35-pound limit need not be met, the reason they were not was due to the fact that the weight

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requirement was put aside as relatively insignificant during the extensive technical analyses that were performed on the proposals and then simply forgotten. Notwithstanding this oversight, NRPO does not feel that any of the offerors were prejudiced. As noted before, Marotta's proposal, allegedly, showed no signs of being limited by weight.

As regards the technical evaluation scoring, it is believed by NRPO that the scoring was done exactly as called for in the request for proposal, although it is noted that the cost proposals were not considered in the final point ranking of the offerors. However, since the cost proposal an offeror could receive at maximum was 9 points and since the spreads between the ITC and Marotta scores were never as small as that, no prejudice to Marotta is felt to exist.

We do not agree with Marotta's contention that the "Feasibility of approach" criterion was eliminated from the evaluation, since the "soundness of approach method" criterion appears, in essence, to be the same criterion.

While we are concerned that the admitted weight deviation was not communicated to all offerors, we note that Marotta scored higher under this criteria than ITC (13 to 11 points) and we therefore fail to see how the protester was prejudiced thereby.

We do not view the other alleged changes in emphasis on various technical approaches as such a radical departure from the evaluation scheme outlined in the solicitation to have required advice to all offerors of the precise numerical weight to be used in the evaluation process. Genasys Corporation, B-187811, July 29, 1977, 77-2 CPD 60.

Finally, Marotta contends that it was excluded from the competitive range because of prejudice of the evaluators, who looked upon another firm and not Marotta as the contractor they would be doing the actual work were the Marotta proposal to be accepted. Also a previous item made by Marotta may have been considered instead of the improved item offered under the Marotta proposal.

Even assuming bias, the protester must show that the evaluation was not reasonable. We do not believe it has done so in this case.



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Optimum Systems, Inc., B-187560, August 31, 1977, 77-2  
CPD 165.

The protest is denied.

*Paul B. Leubling*  
Acting Comptroller General  
of the United States